

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

ALT'S TOOL & MACHINE
10926 Woodside Ave North
Santee, CA 92071

Employer

Docket No(s). 10-R6D2-2986-2988
and 10-R6D2-3266

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On September 1, 2010, the Division of Occupational Safety and Health (the Division) issued to Alt's Tool & Machine, (Employer) four Citations alleging four violations of Title 8, Cal. Code of Regulations. Employer filed timely appeals contesting all Citations.

This matter came on regularly for a scheduled pre-hearing conference on March 21, 2011, before an Administrative Law Judge (ALJ) for the Board. At that time the parties reached a settlement of all citations which was memorialized in an Order dated March 28, 2011. A later *errata* to the Order was issued on April 7, 2011, correcting a mathematical calculation error in the summary table. Both the original and corrected summary tables reflected the settlement terms. In the Order, the ALJ stated "Good cause having been shown, the above captioned matter is resolved as set forth in the attached summary table." In addition, the Order reflected that the settlement was entered into to avoid protracted litigation and costs associated therewith.

The corrected summary table specified the reasons for the settlement as follows: The reason for the Division withdrawing Citation 1 is stated as "based upon new information." Likewise, Citation 4 was withdrawn for the same stated reason. The penalty for Citation 3 was reduced to \$0 based on Director's regulation section 336k (California Code of Regulation, title 8, section 336(k)).

On April 27, 2011, the Board on its own motion ordered reconsideration of the Order to determine whether there was good cause for withdrawing Citations 1 and 4. The Order of Reconsideration sought information as to the basis for the good cause required by Board Regulation 364.2.

The Division and Employer submitted Answers to the Order of Reconsideration. The Division decided to withdraw citations 1 and 4 which it asserts is within its prosecutorial discretion. The Employer stated that it provided information to the Division that disproved the citations.

ISSUE

Whether there was good cause for the disposition of Employer's appeal contained in an Order stating DOSH withdrew Citation 1 and Citation 4 "based upon new information."

DECISION AFTER RECONSIDERATION

Board regulation 364.2 states "(a) Upon a showing of good cause, the Appeals Board may dispose of the issues on appeal by granting a written motion of the parties made at any time, or an oral motion of the parties made on the hearing record or in the prehearing conference." Absent allegations or indications of fraud, the Board has recognized the Division's prosecutorial discretion to withdraw citations as part of negotiated settlements. (*Northern California Paper Recyclers, Inc.*, Cal/OSHA App. 09-2352, Denial of Petition for Reconsideration (Jun. 1, 2010); *California Dept. of Forestry*, Cal/OSHA App. 85-1379, Denial of Petition for Reconsideration (Aug. 28, 1986).) Here, the Division withdrew the two citations after receiving information from the Employer regarding the facts pertaining to the two alleged violations. It appears the Division appropriately exercised its prosecutorial discretion to withdraw the two citations. It is therefore proper to accept the agreement of the parties. (*E & H 126 Investment Inc.*, Cal/OSHA App. 08-3994, Denial of Petition for Reconsideration (Jul. 30, 2009); see also *County of Sacramento v. Workers' Comp. Appeals Bd.* (3rd Dist. 2000) 77 Cal.App.4th 1114.)

We note the limited information in the summary table impeded the Board's ability, on review, to follow Regulation 364.2. The summary table merely stated that "DOSH withdrew based upon new information." Although the Division has broad discretion to issue and withdraw citations as the agency responsible for enforcing the Act, prosecutorial discretion can be abused. (*People v. Jurado* (2006) 38 Cal.4th 73, 78.) And, once citations are appealed, the Board is obligated to afford a hearing or identify good cause for why one will not be afforded. (Labor Code 6602; Rule 364.2.) To give Orders meaningful review, they must set forth sufficient information to justify dispensing with the required hearing.

In this case, the Answers submitted by the parties provided the details of this “new information,” satisfying the good cause requirement. The withdrawal of the citations appears well within the appropriate exercise of the Division’s enforcement discretion. Therefore, the ALJ’s Order and corrected summary table is affirmed and is reinstated.

ART R. CARTER, Chairman
CANDICE A. TRAEGER, Member
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JULY 26, 2011